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U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: MAY 0 4 2009

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IN RE: Petitioner:
Beneficiary: [redacted]

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

M Deadrick
for John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner seeks to classify the beneficiary pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as a member of the professions holding an advanced degree. At the time of filing, the petitioner employed the beneficiary as a research scientist, researching soil and underground water systems. The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the beneficiary qualifies for classification as a member of the professions holding an advanced degree, but that the petitioner has not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

On appeal, the petitioner submits a brief.

Section 203(b) of the Act states, in pertinent part:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. --
>
> > (A) In General. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B) Waiver of Job Offer.
> >
> > > (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The director did not dispute that the petitioner qualifies as a member of the professions holding an advanced degree. The sole issue in contention is whether the petitioner has established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest.

Neither the statute nor the pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

> The Service [now U.S. Citizenship and Immigration Services] believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

Matter of New York State Dept. of Transportation, 22 I&N Dec. 215 (Commr. 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, it must be shown that the alien seeks employment in an area of substantial intrinsic merit. Next, it must be shown that the proposed benefit will be national in scope. Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications.

It must be noted that, while the national interest waiver hinges on prospective national benefit, it clearly must be established that the alien's past record justifies projections of future benefit to the national interest. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The inclusion of the term "prospective" is used here to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

We also note that the regulation at 8 C.F.R. § 204.5(k)(2) defines "exceptional ability" as "a degree of expertise significantly above that ordinarily encountered" in a given area of endeavor. By statute, aliens of exceptional ability are generally subject to the job offer/labor certification requirement; they are not exempt by virtue of their exceptional ability. Therefore, whether a given alien seeks classification as an alien of exceptional ability, or as a member of the professions holding an advanced degree, that alien cannot qualify for a waiver just by demonstrating a degree of expertise significantly above that ordinarily encountered in his or her field of expertise.

The petitioner filed the petition on May 18, 2007. In a job offer letter accompanying the initial filing, [redacted] Director of the petitioner's International Scholar Center, stated: "Although the [beneficiary's] position is not tenure track, the University has no intention of terminating [the beneficiary's] employment."

In a letter accompanying the initial submission of the petition, counsel stated that the beneficiary is "a renowned researcher in the area of hydrological science. . . . [The beneficiary's] colleagues

believe him to be one of the top researchers in his area of expertise." Counsel based this assertion on a number of witness letters submitted with the initial filing of the petition.

At the time of filing, the beneficiary was at work on a collaborative project between the petitioner and the U.S. Department of Agriculture's Agricultural Research Service (ARS). Most of the witnesses are associated with the petitioner, the ARS, or Utrecht University (UU), the Netherlands, where the beneficiary studied for his doctoral degree (not yet awarded as of the filing date). UU [redacted], the beneficiary's "major Professor during his PhD studies," stated that the beneficiary "is making major contributions to address the problems of soil and groundwater pollution."

UU Adjunct Associate Professor [redacted] a Senior Advisor at the Netherlands' National Institute of Public Health and the Environment, stated:

> I have worked closely together with [the beneficiary] for about two years. He is well known among his colleagues as one of the finest researchers in the field of soil and groundwater contaminant problems. . . .
>
> [The beneficiary] has worked with me . . . in the period of 2003-2005. . . . [The beneficiary] set up and conducted column studies to investigate transport of viruses through the subsurface under varying levels of water saturation in combination with various ionic strengths, ion compositions and pH values. He developed models that described that data leading to new insights into the behavior of viruses under unsaturated conditions.

[redacted] a former adjunct professor at the petitioning university and now a Senior Research Scientist at ARS's U.S. Salinity Laboratory, Riverside, California, stated:

> [The beneficiary possesses] very unique expertise in the area of subsurface contaminant transport, especially as related to virus and pathogen transport in the unsaturated (vadose) zone between the soil surface and the groundwater table. My evaluation below is based on extensive knowledge of [the beneficiary's] research, having interacted with him since 2002 when I first met him at a meeting in The Netherlands where he was studying for his Ph.D. His current research here in Riverside focuses on the problems of virus and bacteria transport in soils and groundwater, and finding ways to prevent contamination of drinking water supplies by pathogenic microorganisms resulting from agricultural and other sources (e.g., dairy farms, septic tanks, municipal waste). Within a very short time, [the beneficiary] has become an expert on the many complicated processes controlling pathogenic fate and transport in the environment. . . .
>
> Particularly impressive in his current research are his efforts to understand the effects of fluid saturation on transport in unsaturated soils (where not all pores are filled with

> water, but also contain air). Two superb papers by [the beneficiary] have now appeared in the peer-reviewed international literature. . . . They provide major contributions to the literature and I am sure will very much impact the profession.

[redacted], now a Senior Soil Scientist the Leibniz Centre for Agricultural Research, Müncheburg, Germany, received postdoctoral training from [redacted]. Dr. stated:

> [The beneficiary] has made several outstanding and extremely relevant contributions to our knowledge of subsurface flow and transport processes, and quantification of fate and transport of microbes in saturated and unsaturated environment. The relative importance of virus adsorption to solid phase and air-water interface in unsaturated soils he showed using systematic column experiments, was unknown before.

[redacted], a Soil Scientist at the U.S. Salinity Laboratory, stated:

> [The beneficiary's] research has especially important implications for municipal and agricultural waste water treatment, protection of food and drinking water supplies from pathogenic microorganisms, bioremediation of hazardous waste sites and landfills, and for colloid-facilitated transport of a variety of organic . . . and inorganic . . . contaminants. . . .
>
> I am a member of [the beneficiary's] Ph.D. evaluation and defense committees, and currently serve as one of his supervisors . . . at the [petitioning institution]. . . . [The beneficiary] has contributed extensively to our laboratory and computer modeling research capabilities. He has been particularly instrumental in developing the experimental apparatus to study colloid transport problems in unsaturated porous media, and to simulate pore-scale colloid transport and retention processes. . . . I strongly believe that forthcoming publications related to [the beneficiary's] accomplishments . . . show great potential to have a profound impact on the subsurface colloid transport community, in that it provides a viable alternative to filtration theory (the current paradigm) to describe colloid retention in porous media.

of the University of Delaware, Newark, studied at the petitioning university and has collaborated with [redacted]. Prof. [redacted] praised the petitioner's "surprisingly innovative work" which "is significantly advancing our knowledge of the basic interactions between colloidal particles and the solid phase and the air-water interfaces, and resulting in better theories for predicting pollutant transport in the subsurface."

ARS Soil Scientist [redacted] credited the beneficiary with "a number of very significant research accomplishments in the soil and environmental sciences," which pave the way for "environment-compatible yet cost-effective solutions for safeguarding our soil and groundwater resources from pathogenic contaminants."

The following passage appears in [redacted] letter and in [redacted] letter:

> Through his research, [the beneficiary] has proven to be an innovative and productive scientist, with a laudable commitment to promoting environmental protection and sustainable development. He actively participates in national and international scientific organizations, including presentation of his research findings at professional meetings.

The petitioner did not explain how these two witnesses came to use exactly the same language in their respective letters. It appears that both witnesses relied on template language provided by the petitioner or an unidentified third party.

The two most independent initial witnesses appear to be [redacted] and [redacted]. Dr. [redacted], a Senior Scientist at Los Alamos National Laboratory, stated:

> Because of our Laboratory's interest in the fate and transport of groundwater-based contaminants, we at Los Alamos are very interested in collaborating with [the beneficiary] in the area of virus and bacteria transport in soils and groundwater. We believe it has important applications in homeland security

[redacted] a Professor at Mie University, Japan, praised the beneficiary's "excellent record of accomplishments in research and engineering as related to the prevention, control and remediation of groundwater pollution problems," and stated that the beneficiary "is at the forefront nationally and internationally . . . [of] numerical modeling of the transport of colloidal particles in unsaturated porous media."

Materials in the initial submission identified two published articles co-authored by the beneficiary, with four more articles either in press or under review at the time of filing. The petitioner documented that each of the beneficiary's two published articles had been cited once. The petitioner's initial submission identified only one of the citing articles, so it is not possible to tell from the record whether the other citing article was a self-citation by the beneficiary and/or his collaborators. The petitioner's initial submission thus identified one independent citation of the beneficiary's work.

On March 27, 2008, the director issued a request for evidence (RFE), instructing the petitioner to submit evidence of the beneficiary's influence on his field. In response, counsel asserted that the beneficiary's "works have been cited a minimum of fourteen times within the last two years alone. Moreover, several of those articles were published less than one year ago, attesting the fact that [the beneficiary's] work is on the cutting edge of subsurface contaminant transport."

An updated citation list showed that five of the petitioner's articles had been cited one to five times each, for an aggregate total of 14 citations. Three of these five articles, including the most-cited article with five citations, were published after the petition's May 2007 filing date and therefore

cannot demonstrate the impact of the petitioner's work on the field as of that date. The beneficiary of an immigrant visa petition must be eligible at the time of filing; a petition cannot be approved at a future date after the beneficiary becomes eligible under a new set of facts. *See* 8 C.F.R. §§ 103.2(b)(1), (12); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Regl. Commr. 1971). Of the two articles published prior to the filing date, one was cited three times, the other four times. A list of the citing articles showed that three of these seven citations were self-citations in later articles by the beneficiary.

The petitioner's response included documentation showing that the beneficiary received his doctorate on October 15, 2007. The petitioner submitted a copy of a job offer letter from Lawrence Berkeley National Laboratory (LBNL), offering the beneficiary "a full-time, one year Visiting Postdoctoral Fellow appointment (with an end date of May 1, 2009)." While the University of California operates LBNL on behalf of the U.S. Department of Energy, the laboratory is not located on the Riverside campus that had filed the petition on his behalf.

The petitioner's response to the RFE included seven witness letters, six of which are photocopies of letters included in the initial submission and already discussed above. The only new letter was from [redacted] of Washington State University, Pullman, who undertook postdoctoral training at the petitioning institution in the mid-1990s. [redacted] stated:

> I know [the beneficiary] from his scientific contributions, through his publications and presentations at scientific meetings. He has made significant and important contributions in the field of modeling of variably saturated flow processes and solute transport, particularly with respect to microorganism fate and transport in porous media as well as colloid and colloid-facilitated transport. . . .
>
> Flow and transport in unsaturated porous media differs considerably from those [i]n saturated porous media (i.e., groundwater). . . . [The beneficiary's] contributions have helped to better understand the fundamental aspects of these processes in unsaturated porous media.

The director denied the petition on August 26, 2008, stating that the petitioner had not established that the beneficiary "has reached a degree of accomplishment that is substantially greater than his colleagues." The director observed that much of the RFE response concerned developments that took place after the petition's filing date. The director also found that the petitioner had not established the petitioner's influence on his field. Rather, the director concluded that the witness letters attested to the potential for possible future impact.

On appeal, the petitioner states:

> [The director's] denial states that [the beneficiary] was only cited on three occasions by his peers. In fact, this proves that his work is on the cutting edge of environmental and ground sciences. If scientific research has been done in the past and is

> thoroughly accepted as routine or mundane then it will obviously be cited dozens of times. However, work on the cutting edge will not be cited so frequently because it is new and far ahead of the scientific curve.
>
> The work of [the beneficiary] is new and revolutionary in its field. Although[] his work has not been cited by dozens of his peers . . . in time his work will lead the way to a new method of understanding groundwater contamination. We may look back on the work of [the beneficiary] in the not too distant future and see that his work is cited by dozens upon dozens of scientists. However, clearly today we examine his work and notice it is only cited by three fellow scientists. This proves his work is at the cutting edge.

The petitioner's argument relies on several unproven and highly tenuous assumptions. First, the petitioner assumes that scientific articles are cited not because they impart new information, but because they are "routine or mundane." The second assumption, a corollary to the first, is that scientists tend to avoid citing articles that they recognize as being revolutionary or "cutting edge." The petitioner offers no support for either of these assumptions. Third, the petitioner assumes that the only possible explanation for a low citation rate is that the work in question "is at the cutting edge." This assumption is plainly false. A given article may be poorly cited because it appears in an obscure journal with minimal circulation; because it imparts no useful new information; or because the assertions put forth in the article are generally seen as incorrect.

It is very significant that in its response to the RFE, the petitioner had previously attempted to claim a high number of citations of the beneficiary's articles, focusing on the fact that the articles "have been cited a minimum of fourteen times within the last two years alone." Only after the director's critique of this claim has the petitioner contended that a low number of citations "proves [the beneficiary's] work is at the cutting edge."

It is also significant that, according to *curriculum vitae* [redacted] published articles have an *h*-index of 18, meaning that 18 of his articles have each been cited at least 18 times. In comparison, the record indicates that the beneficiary's work has an *h*-index of 3 (three papers cited three or more times). If a high citation rate is a sign of "routine or mundane" work, it is puzzling that [redacted] would highlight the banality of his own work by drawing attention to the hundreds of citations his work has received. It appears far more likely that a high citation rate is a point of pride for a researcher, and an indication that one's published work has had documented influence.

The petitioner's next argument is also not persuasive:

> In an age where our economy is leading to less and less tax revenues for government cost-effectiveness is extremely important. Although we need to protect our nation from disease, we must be cognizant of the costs involved. Grant monies given to [the petitioner] for [the beneficiary] to perform his research are a part of these costs. If a

> labor certification is erroneously required all of the investments in [the beneficiary's] research will ultimately be equivalent to throwing that money into the wind.

The petitioner's argument rests on the unproven presumption that the labor certification process would inevitably force the beneficiary's departure from the United States. A larger flaw in the petitioner's argument, however, is the assertion that grant money that has already subsidized the beneficiary's past research is wasted unless the beneficiary receives a waiver. This would be the case only if the beneficiary's existing findings were destroyed prior to publication. Once published, the beneficiary's work is indelibly incorporated into the body of scientific knowledge, whatever the beneficiary's subsequent immigration status.

The petitioner contends that the petitioner "cannot find another scientist to step in and perform this research." Before the petitioner made this argument on appeal, the beneficiary had already applied for positions elsewhere, as shown by LBNL's job offer. If the beneficiary accepted this offer, then the petitioner already must find another scientist, regardless of the outcome of this proceeding. The beneficiary's position with the petitioner was not permanent, and the postdoctoral appointment at LBNL is clearly designated as temporary. Short-term research appointments can be covered by a nonimmigrant visa, as the beneficiary's past work in the United States proves.

The petitioner asserts that the witness letters in the record demonstrate "the influence that [the beneficiary] has on his growing field of science." We have already discussed the witness letters above. Certainly a number of witnesses consider the beneficiary's work to be important, but there is little indication that the beneficiary's work has attracted significant notice outside of the institutions where he and his mentors have worked. Also, the submission of two letters containing identical passages raises questions about the origin of the wording in those letters. The objective documentation in the record does not tend to support the conclusion that the beneficiary had become an influential figure in his field before he even received his doctorate.

As is clear from a plain reading of the statute, it was not the intent of Congress that every person qualified to engage in a profession in the United States should be exempt from the requirement of a job offer based on national interest. Likewise, it does not appear to have been the intent of Congress to grant national interest waivers on the basis of the overall importance of a given profession, rather than on the merits of the individual alien. On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved labor certification will be in the national interest of the United States.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden. This denial is without prejudice to the filing of a new petition by a United States employer accompanied by a labor certification issued by the Department of Labor, appropriate supporting evidence and fee.

ORDER: The appeal is dismissed.